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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 704

AMERICAN TOLL BRIDGE COMPANY, A CORPORATION,
Appellant,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, WALLACE L. WARE, FRANK R. DEVLIN, RAY L. RILEY, RAY C. WAKEFIELD AND LEON O. WHITSELL, AS MEMBERS OF AND CONSTITUTING THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

✓ IRA H. ROWELL,
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O. WHITSELL, AS MEMBERS OF AND CONSTITUTING THE
RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Appellees.

**STATEMENT OF APPELLEES OPPOSING JURISDIC-
TION AND MOTION TO DISMISS OR AFFIRM.**

Pursuant to Rule 12, Paragraph 3, of Rules of Court, the appellees herein respectfully present their statement in opposition to the jurisdiction of the Court on the appeal in the above cause, and move the Court to dismiss the appeal or to affirm the judgment appealed from.

**Appellant's Assignment of Errors and Statement of
Jurisdiction.**

Concisely stated, the appellant declares in its assign-
ment of errors and statement of jurisdiction that a con-

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tract right has been impaired and its property taken by the judgment of the Supreme Court of the State of California (the opinion of the court appears as Appendix 5 to Statement of Jurisdiction), in that the court failed to find for appellant in its contentions, as follows:

1. That appellant possesses a county franchise to maintain a toll bridge over the Straits of Carquinez in the State of California, which franchise, including the provisions of existing statutes," namely, Sections 2845 and 2846 of the Political Code, constitutes a contract prohibiting any public authority from reducing the tolls first fixed in that franchise, "unless it appears that said tolls are yielding a net return in excess of 15% on the rate base established by Sections 2845 and 2846 of the Political Code of the State of California." (Assignment 1; Statement of Juris., E-1.)

2. That an order issued by the appellee, the Railroad Commission of the State of California, reducing the tolls on said Carquinez Bridge, impaired such franchise contract in violation of Section 10, Article I of the Constitution, and confiscated appellant's property in said bridge in violation of Section 1 of the Article XIV of the Constitution. (Assignments 1 and 2; Statement of Juris., E-2.)

3. That the Railroad Commission deprived appellant of due process of law and of the equal protection of the laws in that the "inevitable effect" of the reduction of tolls on the Carquinez Bridge would, by the "force of competition," compel appellant to make a similar reduction of tolls on another bridge owned and maintained by appellant at Antioch, California. (Assignments 5 and 7.)

4. That the Railroad Commission deprived appellant of due process of law in that it instituted an investigation into the rates of the Carquinez Bridge on its own motion, without the filing of a complaint or the making of charges

against appellant, and the Commission did not, prior to the decision rendered, advise appellant of the Commission's proposals. (Assignment 8.)

Presumably, therefore, the appellant presents its appeal on the theory that the rate-fixing order of the Railroad Commission constitutes a "statute," as that term is used in Section 344, Title 28, U. S. C. A., the validity of which statute appellant questions under the Constitution of the United States.

Such statute is not set forth in appellant's Statement of Jurisdiction, as required by Rule 12. Nor has the appellant set forth the alleged rate contract, or the statutory provisions upon which it relies to support its claim of contract right.

Therefore, in order to make the issue more clear, appellees will quote here the two sections of the Political Code to which appellant refers, as those sections read on February 5, 1923, when its franchise to build and maintain its Carquinez Bridge was obtained:

"2845. The Board of Supervisors granting authority to construct a toll bridge or to keep a public ferry, must at the same time:

"1. Fix the amount of a penal bond to be given by the person or corporation owning or taking tolls on the bridge or ferry for the benefit of the county and all persons crossing or desiring to cross the same, and provide for the annual renewal thereof;

"2. Fix the amount of license tax to be paid by the person or corporation for taking tolls thereon, not less than three nor over one hundred dollars per month, payable annually;

"3. Fix the rate of tolls which may be collected for crossing the bridge or ferry, which must not raise annually an income exceeding fifteen per cent on the

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actual cost of the construction or erection and maintenance of the bridge or ferry for the first year, nor on the fair cash value together with the repairs and maintenance thereof for any succeeding year;

"4. Make all necessary orders relative to the construction, erection, and business of licensed toll bridges or ferries which they have by law the power to make. The Board of Supervisors may, at any time they see fit, authorize and maintain fords across any water within any distance of any licensed toll bridge or ferry."

"2846. The license tax and rate of toll fixed as provided in the preceding section must not be increased or diminished during the term of twenty years, at any time, unless it is shown to the satisfaction of the board of supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge or ferry. The license tax fixed by the board of supervisors must not exceed ten per cent of the toll annually collected."

It should be noted that appellant does not challenge the authority of the Railroad Commission to fix its tolls. It contends merely (Assignment 6) that the Railroad Commission, when "stepping into the shoes of the Board of Supervisors," must follow "the rate making standard fixed and prescribed by the Legislature" in the above quoted sections of the Political Code. Or, as appellant more specifically declares in its statement of jurisdiction (E-1), the Railroad Commission may not reduce the tolls "unless it appears that said tolls are yielding a net return in excess of 15% on the rate base established by Sections 2845 and 2846 of the Political Code."

Contract Impairment Question is Not Substantial.

It is submitted that the question of contract impairment is so unsubstantial upon its face as to require dismissal of the appeal.

There is no allegation that the county franchise of itself is a contract protecting appellant from rate changes during the term of the franchise. No statute is cited, other than the Code sections above, to indicate that the county supervisors were empowered to enter into a franchise rate contract.

Thus appellant relies upon the Code provisions alone to establish its claim both as to the existence of a contract and the terms of such alleged contract in respect to the rates and rate-making standards secured to appellant during the term of its franchise. Clearly, however, the Code provisions do not read as appellant paraphrases them, nor can they possibly be construed to have the intent and meaning which the appellant asserts. To the contrary, just as the Supreme Court of California stated in its opinion, the claimed construction "fails to give full import to the language of the section which prohibits either an increase or a reduction in the tolls unless the receipts are shown to be disproportionate. The language contemplates increases as well as reductions at any time the disproportion is shown to exist, limited by the fifteen per cent maximum. Such language is inconsistent with any intent to enter into a contract that a fifteen per cent return will be assured to the grantee of the franchise, if the toll rate established produced that much."

It is equally clear that the construction given to the provisions of the Political Code by the Supreme Court of the State of California reveals that the judgment from which the appeal has been taken was one based upon a non-Federal ground adequate to support such judgment.

The Question of Confiscation is Not Substantial.

Nowhere in appellant's assignment of errors or statement of jurisdiction does appellant indicate why or how the claimed confiscation of its property results from the rate order issued by the Railroad Commission, except that appellant will not receive a return of 15 per cent upon what it terms the "rate base established by Sections 2845 and 2846 of the Political Code of the State of California."

The fact is, as the court's opinion fully explains, the Railroad Commission fixed rates to yield appellant $7\frac{1}{2}$ per cent return upon the property value taken as a rate base. In the litigation below, appellant denied that the rates fixed would yield a return of $7\frac{1}{2}$ per cent, but conceded that they would yield 6.6 per cent.

It is suggested in the assignment of errors that the Commission failed to recognize and give effect to the rights of appellant "in a wasting asset." On the contrary, the Supreme Court of California correctly states that the Commission, in computing the net annual receipts, made allowances for depreciation reserves, including amortization of the entire investment before the expiration of the franchise period.

The Claimed Denial of Due Process is Not Substantial.

The appellant asserts that the entire procedure before the Railroad Commission constitutes a denial of due process of law, relying upon the case of *Morgan v. United States*, 304 U. S. 1.

The cited case bears no similarity at all to the one at hand. The actual facts as to the rate proceeding before the Railroad Commission are revealed in the opinion of the State court. The proceeding was initiated in the usual manner by an order instituting an investigation into the

reasonableness of appellant's rates. Evidence was taken before a Commissioner without limitation. Appellant submitted the matter for decision without argument. The Supreme Court accorded a full judicial review of the Commission's order, and stayed the operation of the order pending final determination of the cause.

WHEREFORE it is respectfully submitted, and the appellees so move the Court, that the appeal from the judgment of the Supreme Court of the State of California be dismissed, or the judgment of that court be affirmed.

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